No. 84048-2
(on appeal from Pierce County Superior Court Cause No. 06 2 08565 1)

SUPREME COURT OF THE STATE OF WASHINGTON

MITCH DOWLER and IN CHA DOWLER, individually and as limited guardian ad litem for NAM SU CHONG, et al.,

Appellants,

vs.

CLOVER PARK SCHOOL DISTRICT NO. 400,

Respondent.

RESPONDENTS' ANSWER TO APPELLANTS' STATEMENT OF GROUNDS FOR DIRECT REVIEW

Vandeberg Johnson & Gandara, LLP

William A. Coats, WSBA #4608
H. Andrew Saller, Jr., WSBA #12945
Daniel C. Montopoli, WSBA #26217
Attorneys for Respondent
1201 Pacific Avenue, Suite 1900
P. O. Box 1315
Tacoma, WA 98401-1315
(253) 383-3791

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

I. NATURE OF THE CASE AND DECISION

This case concerns the education of disabled students, where the Plaintiffs (parents of special education students) alleged deficiencies in the education of their children without exhausting the administrative remedies available to them under state and federal law governing special education. The concept of "special education" is predicated upon the granting of special rights to disabled students to receive a free appropriate public education. With these rights, comes the responsibility of exhausting administrative procedures that are designed to ascertain, evaluate, and alleviate the educationally-related complaints of special education students in a timely manner. Parents dissatisfied with any matter relating to the education of their child have the right to request a due process hearing before an administrative law judge.

The vast majority of courts throughout the United States have required plaintiffs to exhaust their administrative remedies under the Individuals with Disabilities Education Act (IDEA)[1] prior to filing suit whenever plaintiffs have alleged injuries that could be redressed to any degree by administrative procedures before administrative law judges with expertise in special education. This principal holds true even when plaintiffs have alleged discrimination or abuse.

In accordance with these cases, the trial court properly dismissed Plaintiffs' suit for failure to exhaust their administrative remedies because

---

[1] 20 U.S.C. §§ 1400-1491.

Plaintiffs' suit included educationally-related issues which should be addressed in administrative hearings. Because exhaustion of administrative remedies under the IDEA is well settled throughout the United States, Appellants have failed to advance a valid reason why this Court must immediately address the issues raised by this appeal. Thus, the Clover Park School District requests that this Court deny the Appellants' request for direct review.

Appellants incorrectly state that their claims are not related to special education. The trial court disagreed. The trial court's determination that Plaintiffs' suit contained educationally-related issues is well supported by Plaintiffs' Third Amended Complaint ("Complaint"), by the deposition testimony of the Plaintiffs, and by the Plaintiffs' briefing submitted to the trial court. For example, the Complaint alleged:

- The "District has implemented a curriculum that objectively demeans developmentally disabled students." Compl. at ¶ 5.4;
- A teacher stated he was not responsible for teaching anything new to the students. Compl. at p. 7;
- The District failed to follow Plaintiff Dobrinski's Individualized Education Program. Compl. at p. 9;
- The District ignored the special needs of Plaintiff Vollmer by placing him in a team sport setting with non-disabled students. Compl. at p. 10;
- The District failed to pay attention to "the actual instruction given" to Plaintiff students and the students were left without supervision in the classroom. Compl. at p. 11;
- Para-educators worked only with "easy students" while ignoring "difficult students." Compl. at p. 11;

- That teachers in the special education department referred to their positions as "glorified babysitting positions" and "Little if any attention was given to the actual instruction of these developmentally disabled children." Compl. at pp. 11, 12;
- Para-educators "were often witnessed during class time searching the internet, reading newspapers." Compl. at p. 11;
- "Instead of being taught, these children have often been subject to repeatedly watching the same movies over and over again." Compl. at p. 12.

In addition, the Complaint sought relief for "loss of educational opportunities," and for "loss of academic, vocational and athletic opportunities," and requested an award of "compensatory education" to offset the losses caused by the District's conduct. Compl. at ¶ 7.1, 8.5.

Similarly, the deposition testimony of the Plaintiffs reinforced the educational issues underlying this case. For example, Plaintiff Mitch Dowler complained about the "inadequate education" provided his son, Nam Su Chong, and responded to a question about what he was seeking from this lawsuit by stating: "Number one, Nam Su's gonna get the education he deserves."

Plaintiff Kathleen Davis complained that her daughter "missed half of her education," and when asked what she wanted for her daughter, Ms. Davis responded: "I would like to see her get the education she deserves." Regarding her son, Zachary Davis, Ms. Davis complained about the lack of computer instruction in his education program and claimed that he lost skills because of a lack of curriculum.

Plaintiff Denise Lumley testified that she was dissatisfied with the District's failure to meet the goals in her son's educational programs and criticized his programs because they lacked sufficient speech therapy and one-on-one assistance. Plaintiff Melanie Stevens stated what she wanted from the District in this lawsuit: "I'm seeking that they need to go back and reeducate my son, give him the education that he is due." Plaintiff Yolanda Sullivan testified that the District did not meet the goals in her daughter's Individual Education Program, and added that she would like her daughter to receive "additional education." Plaintiff Judith Vollmer testified about the District's alleged failure to provide an aide for her son and when asked what she wanted from the District for her son, Ms. Vollmer stated: "I would like him to have the education he deserved."

When the District moved for the summary judgment dismissal of Plaintiffs' claims for failure to exhaust, the Plaintiffs responded by voluntarily dismissing their educationally-related claims under CR 41. If escaping exhaustion were so easy, plaintiffs in every case would try to circumvent exhaustion by "waiving" their educationally-related claims or by avoiding any mention of special education law in their complaints. Courts have rejected such bald attempts at circumventing exhaustion.[2]

Moreover, even *after* moving to voluntarily dismiss their educationally-related claims, Plaintiffs' summary judgment response itself

---

[2] *See e.g., Charlie F. v. Board of Educ,* 98 F.3d 989, 993 (7th Cir. 1996) (stating that it was "unwilling to allow parents to opt out of the IDEA by proclaiming that it does not offer them anything they value.")

contained numerous educationally-related complaints. These complaints included charges that: Teachers were seldom in class; a plaintiff was forced to watch the same movie every day; a teacher would yell at a plaintiff; the District improperly disciplined specific plaintiffs; and that a plaintiff was inappropriately placed in a time-out room.

All of the above allegations are educationally-related claims that persist despite Plaintiffs' attempt at exorcising them via a motion to dismiss. The Appellant's request for direct review by this Court conveniently ignores the existence of these educationally-related issues.

Because educationally-related issues remained unresolved and because administrative procedures could address these issues, the trial court correctly dismissed plaintiffs' suit for failure to exhaust. Because the issue of exhaustion under the IDEA is well settled, this Court should deny Plaintiffs' request for direct review.

II. ARGUMENT WHY DIRECT REVIEW SHOULD NOT BE GRANTED

A. The Requirements for Direct Review

The Rules of Appellate Procedure state that a party may seek direct review by this Court of a decision of the superior court *only* in a few limited circumstances. RAP 4.2(a). The Appellants contend that direct review is warranted because their appeal concerns "an issue of first impression involving a fundamental and urgent issue of broad public import that ultimately must be decided by this Court." Appellants' Statement at 6. There are several reasons why this argument fails.

First, the issue of exhaustion of administrative remedies under special education law is well settled throughout the United States. While no Washington case has addressed this specific issue, the vast majority of courts throughout the United States have held that exhaustion is required whenever plaintiffs allege injuries that could be redressed to any degree by administrative procedures. This principle holds true even when the plaintiffs have filed suit claiming discrimination or abuse and when the plaintiffs have avoided any mention of special education law in their complaints. Moreover, outside the special education context, the doctrine of exhaustion of administrative remedies is well established in Washington. Finally, the Appellants have failed to cite any study or news account indicating that the issues presented by the Appellants involve urgent matters of broad public import which would require immediate review by this Court.

B. Direct Review Should Not Be Granted Because Exhaustion of Administrative Remedies Under IDEA Is Well Settled and Does Not Require Prompt Determination by this Court.

To understand why the trial court correctly dismissed the Plaintiffs' suit requires a discussion of special education law and the administrative remedies available to parents of special education students.

State and federal law require that school districts must offer special education students the opportunity for an appropriate education at public expense. RCW 28A.155.010; 20 U.S.C. § 1412. As this Court has stated:

> The IDEA was enacted to address the special educational needs of disabled children. The act's purpose is

> "to assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs...." 20 U.S.C. § 1400(c). . . .

Tunstall v. Bergeson, 141 Wn.2d 201, 228, 5 P.3d 691 (2000); *see also Kutasi v. Las Virgenes Unified School District,* 494 F.3d 1162 (9th Cir. 2007) (IDEA is a "comprehensive educational scheme that confers on students with disabilities a substantive right to public education.")

To help states meet their educational needs, the IDEA provides financial assistance, but this financial assistance requires that states establish policies and procedures to assure disabled children the right to a free appropriate public education ("FAPE"). 20 U.S.C. § 1412(a)(1).

To achieve that end of offering a FAPE to disabled children, the IDEA requires that school districts develop an individualized education program ("IEP") for each child with a disability covered by IDEA. Along with teachers and school staff, parents serve as members of the team that creates the IEP. 20 U.S.C. § 1414(d)(1)(B). The IEP includes a written statement of the child's present education level, annual goals and short-term instructional objectives for the child, and the specific educational services to be provided to the child. 20 U.S.C. § 1414(d)(1)(A). Regulations also require that parents receive periodic reports of the child's progress in attaining the goals of the IEP. 34 C.F.R. § 300.320(a)(3)(ii).

1. The Administrative Remedies Available to Special Education Students and Their Parents.

To ensure the appropriateness of the education offered to a special education student, the IDEA establishes a series of procedural protections.

For example, a school district must provide written notice to the parents before developing or changing an IEP. 20 U.S.C. § 1415(b)(3).

In addition, a parent has the right "to object to the adequacy of the education provided, the construction of the IEP, or some related matter." *Winkelman v. Parma City School District*, 550 U.S. 516, 127 S. Ct. 1994, 2001, 167 L. Ed 904 (2007) (citing § 1415(b)(6)). The IDEA states specifically that parents have the right to complain about "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6).

Either individually or on behalf of a disabled child, a parent challenging "any matter" relating to the education of a disabled child has the right to an impartial due process hearing. 20 U.S.C. § 1415(f)(1). At the hearing, the administrative law judge has the authority to order that the student's IEP be modified. To address the alleged deficiencies in a student's past education, the ALJ could order a wide range of relief, including, tutoring, reimbursement for private instruction, extended school year instruction, extracurricular activities, psychological counseling for the student or the parents, and social work services. 34 C.F.R. § 300.106, 20 U.S.C. § 1401(26), 34 C.F.R. §§ 300.34(a) & 34(c), 34 C.F.R. § 300.107(b). While the right to a FAPE terminates when the child reaches age 21, an award of compensatory education may extend beyond that age to make up for any earlier deprivation. *M.C. v. Central Regional Sch. Dist.*, 81 F.3d 389, 395 n.4 & n.5 (3d Cir. 1996).

In addition, Washington has adopted legislation and regulations to implement IDEA and its due process hearing requirement. *See* RCW 28A.155.010-.160 and WAC 392-172A-01000—07070. The Legislature has designated the Office of the Superintendent of Public Instruction (OSPI) as the agency with expertise in the area of special education and has provided OSPI with the authority to resolve complaints involving the provision of special education and related services. RCW 28A.155.020-.030. State regulations require that disputes involving special education be resolved in a timely fashion: An administrative law judge must render a decision within 45 days after OSPI receives the due process hearing request. WAC 392-172A-05090 & 392-172A-05105.

Finally, any party aggrieved by the decision of the administrative law judge has the right to bring a civil action. 20 U.S.C. § 1415(i)(2)(A). The procedure governing judicial review, however, contemplates that court action will be instituted only after an administrative due process hearing: "In any action brought under this paragraph, the court - (i) shall receive the records of the administrative proceedings." § 1415(i)(2)(C).

2. Exhaustion of Administrative Remedies Is Required When Some of a Plaintiff's Alleged Injuries Could Be Redressed to Any Degree by IDEA.

In general, judicial review is available only after plaintiffs exhaust their administrative remedies under the IDEA. *See Honig v. Doe*, 484 U.S. 305, 326-27, 108 S. Ct. 595, 98 L. Ed. 686 (1988) (failure to exhaust administrative remedies under IDEA precludes judicial review); *Doe v. Arizona Dep't of Educ.*, 111 F.3d 678, 680-81 (9th Cir. 1997) ("Judicial

review under IDEA is ordinarily available only after the plaintiff exhausts administrative remedies."). The IDEA itself states that exhaustion of administrative remedies is required whenever a party seeks relief that is available under the IDEA. 20 U.S.C. § 1415(*l*).

As the Second Circuit has noted, this exhaustion requirement applies in federal and state courts: "It is well settled that the IDEA requires an aggrieved party to exhaust all administrative remedies before bringing a civil action in federal or state court." *J.S. ex rel. N.S. v. Attica Cent. Schools*, 386 F.3d 107, 112 (2d Cir. 2004). The Ninth Circuit explained the rationale behind exhaustion:

> The IDEA's exhaustion requirement . . . . allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.

Hoeft v. Tucson Unified School Dist., 967 F.2d 1298, 1303 (9th Cir. 1992).

There are, however, exceptions to the exhaustion requirement. Exhaustion will not be required if doing so would be (1) futile or inadequate; or (2) the agency has adopted a policy or pursued a practice of general applicability that is contrary to law. *Hoeft*, 967 F.2d at 1303-04.

Here, the Plaintiffs have not alleged that an administrative agency has adopted a policy or pursued a practice of general applicability that is contrary to law. Thus, for exhaustion to be excused, the Plaintiffs must show that requiring exhaustion would be futile or inadequate. *See Kutasi,*

494 F.3d at 1168 (A party "that alleges futility or inadequacy of IDEA administrative procedures bears the burden of proof.").

Exhaustion, however, will not be futile or inadequate if a plaintiff's alleged injuries could be redressed to any degree by IDEA, even when it is not clear whether IDEA could provide a remedy:

> [I]f the injury could be redressed "to any degree" by the IDEA's administrative procedures—or if the IDEA's ability to remedy an injury is unclear—then exhaustion is required.

Kutasi, 494 F.3d at 1168. *Kutasi* stressed that exhaustion will still be required even when the plaintiffs would prefer another form of relief:

> For purposes of exhaustion, "relief that is also available under" the IDEA does not necessarily mean relief that fully satisfies the aggrieved party. Rather, it means "relief suitable to remedy the wrong done the plaintiff, which may not always be relief in the precise form the plaintiff prefers."

Kutasi, 494 F.3d at 1169 (quoting *Robb v. Bethel School District*, 308 F.3d 1047, 1049 (9th Cir. 2002)).

In *Robb*, the plaintiffs argued that exhaustion was futile because they were seeking only money damages, which are not allowed by IDEA. *Robb*, 308 F.3d at 1151. The Ninth Circuit rejected that argument:

> We are not ready to say that money is the only balm.
>
> The educational professionals and hearing officers who evaluate claims under the IDEA may conclude (a) that adequate remedial services can be provided or (b) that Latosha Robb does not require services. The first outcome would show that relief is available under the IDEA; the second would provide information relevant to Ms. Robb's claims under statutes other than the IDEA. In either event,

> pursuit of the administrative process would be fruitful, rather than futile.

Robb, 308 F.3d at 1150. Thus, the absence of monetary damages in IDEA does not mean that IDEA cannot provide remedies where torts and discrimination affect a special education student's ability to obtain the benefits of a public education.

Applying *Robb,* the *Kutasi* court affirmed the dismissal of plaintiffs' discrimination claims for failure to exhaust. *Kutasi,* 494 F.3d at 1164. The *Kutasi* court required exhaustion because the plaintiffs had alleged "injuries that could be redressed to some degree by IDEA's administrative procedures and remedies." *Id.* at 1170.

In requiring exhaustion, the *Kutasi* court distinguished the same two cases relied upon by the Appellants here in their request for direct review: *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271 (9th Cir. 1999) and *Blanchard v. Morton Sch. Dist.,* 420 F.3d 918 (9th Cir. 2005). The *Kutasi* court distinguished *Witte* and *Blanchard* primarily because all educational issues in those cases had been resolved prior to the plaintiffs commencing litigation. *Kutasi,* 494 F.3d at 1169.

For example, the parties in *Witte* had resolved all educational issues through the IEP process prior to the plaintiff filing suit. *Witte*, 197 F.3d at 1275. Similarly, the plaintiff in *Blanchard* previously had represented her autistic son in several administrative actions that resulted in an order requiring the school district to implement an IEP and provide compensatory education to the student. *Blanchard,* 420 F.3d at 920. Thus,

the plaintiff had "resolved the educational issues implicated by her son's disability" while obtaining the relief available under the IDEA. *Id.* at 922.

Here, all educational issues have not been resolved. *See supra,* pages 2 to 5 (discussing Plaintiffs' Third Amended Complaint, the deposition testimony of the Plaintiffs, and Plaintiffs' summary judgment response). Thus, Plaintiffs' reliance upon *Witte* and *Blanchard* is misplaced. Because all educational issues have not been resolved, the trial court correctly dismissed the suit for failure to exhaust.

3. Even When Plaintiffs Allege Discrimination or Abuse, Exhaustion Will Be Required If There Are Unresolved Educational Issues.

Numerous cases have held a plaintiff's failure to exhaust administrative remedies under the IDEA requires dismissal of a plaintiff's discrimination or abuse claim whenever some of a plaintiff's alleged injuries could be addressed to any degree by administrative procedures. *See Kutasi; Robb; Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 29 (1st Cir. 2006) (plaintiff may not use the ADA or § 504 of the Rehabilitation Act in an attempt to evade the "remedial structure of the IDEA."); *Cudjoe v. Independent Sch. Dist. No. 12*, 297 F.3d 1058, 1068 (10th Cir. 2002) (discrimination claim barred by failure to exhaust because the "genesis and manifestation" of the claims were educational); *M.T.V. v. DeKalb County School Dist.*, 446 F.3d 1153 (11th Cir. 2006) (ADA and § 504 claims barred for failure to exhaust); *Polera v. Board of Educ. of Newburgh Enlarged City School Dist.,* 288 F.3d 478 (2nd Cir. 2002)

(failure to exhaust bars ADA and § 504 claims); *Charlie F.*, 98 F.3d at 993 (discrimination and state law tort claims based upon abuse by school employees dismissed for failure to exhaust because allegations "have both an educational source and an adverse educational consequence."); *Hayes v. Unified Sch. Dist. No. 377,* 877 F.2d 809, 812-13 (10th Cir. 1989) (requiring exhaustion because discipline—including use of time-out room—was educationally-related).

Similarly, the exhaustion requirement applies in state cases. *Shields v. Helena Sch. Dist. No. 1*, 943 P.2d 999 (Mont. 1997) (requiring exhaustion even though plaintiffs advanced state claims without invoking IDEA); *Koopman v. Fremont Cty. Sch. Dist. No. 1*, 911 P.2d 1049 (Wyo. 1996) (same); *Franklin v. Frid*, 7 F. Supp.2d 920, 925 (W.D. Mich. 1998) (dismissing federal and state discrimination and state tort claims involving allegations of abuse for failure to exhaust); *Waterman v. Marquette-Alger Intermediate Sch. Dist.,* 739 F. Supp. 361, 363-65 (W.D. Mich. 1990) (requiring exhaustion even though complaint involved "disturbing allegations of excessive and abusive discipline" in violation of federal law and state tort law because discipline covered by IDEA).

4. The Exhaustion of Administrative Remedies Under State Law Is Well Established in Washington.

In addition to the requirements of special education law, the doctrine of exhaustion of administrative remedies is well established in Washington. *Smith v. Bates Technical College,* 139 Wn.2d 793, 808, 991 P.2d 1135 (2000). In general, "A party must exhaust all available

administrative remedies before the superior court can grant relief." *Harrington v. Spokane County,* 128 Wn. App. 202, 209, 114 P.3d 1233 (2005) (affirming summary judgment dismissal for failure to exhaust).

As the *Harrington* court explained, the doctrine allows for the exercise of agency expertise, develops the factual and technical record, allows the agency to correct errors, and discourages litigants from ignoring administrative procedures by prematurely resorting to the courts. *Harrington,* 128 Wn. App. at 210. These reasons apply here.

III. CONCLUSION

For the above reasons, the Respondent asks that this Court deny the request for direct review.

Respectfully submitted this 2nd of February, 2010.

VANDEBERG JOHNSON &
GANDARA, LLP

By _____
William A. Coats, WSBA #4608
H. Andrew Saller, Jr., WSBA #12945
Daniel C. Montopoli, WSBA #26217
Attorneys for Respondent